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No. 91-471

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHEMICAL WASTE MANAGEMENT, INC.,
Petitioner,

v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA; ALABAMA DEPARTMENT OF REVENUE; and JAMES M. SIZEMORE, JR., COMMISSIONER OF THE ALABAMA DEPARTMENT OF REVENUE,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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SUPPLEMENTAL BRIEF OF COMMISSIONER SIZEMORE AND THE ALABAMA DEPARTMENT OF REVENUE IN REPLY TO BRIEF OF THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Where the health and safety of Alabama's citizens, and its environment, are placed at risk by the landfilling of hazardous waste at Petitioner's commercial facility (which receives 85% to 90% of its hazardous waste from out-of-state), does the Commerce Clause prohibit Alabama from limiting the health, safety and environmental risks by imposing a disincentive in the form of a $72 per ton disposal fee upon such imported hazardous waste?

2. Does a $25.60 per ton levy imposed evenhandedly on the commercial landfilling of in-state and out-of-state hazardous waste violate the Commerce Clause simply because the levy does not apply to non-commercial disposal of hazardous waste, and Petitioner's commercial activity most often involves out-of-state hazardous waste?

3. Does the Cap Provision, which limits growth in the annual volumes of landfilled hazardous waste and applies evenhandedly regardless of the origin of the waste, violate the Commerce Clause?

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The Solicitor General's brief reflects a fundamental lack of understanding of the prior decisions of this Court upon which the decision of the Supreme Court of Alabama is based.

I. THE ADDITIONAL FEE

The Solicitor General's recommendation for summary reversal is based upon *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), a case which the Supreme Court of Alabama distinguished on the basis of this Court's own interpretations of that case and on the same basis that

this Court distinguished that case in *Maine v. Taylor*, 477 U.S. 131 (1986).

Although recognizing that the health and safety of Alabama citizens and the environment of the State are placed at risk by Petitioner's activities, the Solicitor General fails to acknowledge that the traditional police powers of the states include the power to regulate or limit *importation* of articles which create risks of the nature involved.

The Solicitor General's argument that the legitimate state concerns intended to be addressed by the Additional Fee could be served by non-discriminatory alternatives rests on the failure to identify correctly the legitimate state concerns which the Additional Fee serves. The Solicitor General entirely fails to address the underlying premise of the holding below—that the State has a legitimate interest in controlling the risks created by the rapidly growing volumes of additional hazardous wastes being brought into the State, separate and apart from the State's interest in controlling the risks of such wastes being generated within the State. The Additional Fee is not based solely on the origin of the waste. It is based on the fact that the waste to which it applies is by far the largest and most rapidly growing source of the environmental and public health concerns involved, and upon the compounding of dangers to the State which results from allowing such additional waste to be brought into the State. Alabama is not attempting to limit the importation of out-of-state hazardous waste because the waste is *out-of-state* hazardous waste; it is doing so because it is out-of-state *hazardous* waste.

The Solicitor General incorrectly attempts to distinguish this Court's decision in *Maine v. Taylor* when he states that "the dispositive fact in that case was that the out-of-state bait fish contained a parasite that the local fish did not, and thus posed a new risk." Brief of U.S. at 10. The risk was not "new." The district court

found that at least some of the parasites Maine sought to exclude were already present in the state,[1] and the First Circuit would have struck down the Maine regulation in part on the grounds that "Maine provides no protection against in-state parasites and related harms that may exist at large in-state hatcheries." *U.S. v. Taylor*, 752 F.2d 757, 765 (1st Cir. 1985), *rev'd sub nom. Maine v. Taylor*, 477 U.S. 131 (1986). This Court found it to be "of little relevance that fish can swim directly into Maine from New Hampshire." *Maine v. Taylor*, 477 U.S. at 151.

The Solicitor General's interpretation of the "dispositive fact" in *Maine v. Taylor* and his attempt to distinguish that case appear to be based on an assumption that in order for a state to regulate the importation of noxious items, the items must create a risk different *in kind* from problems already existing within the state, and that a state may not regulate the importation of items which create risks markedly greater *in degree*. Such a distinction between risks different in kind and risks different in degree has not been the basis for this Court's prior decisions, and there is no logical reason for creating such a distinction. Under the Solicitor General's construction of the Commerce Clause, a state trying to cope with the problems of disease afflicting in-state livestock could not regulate the importation of more diseased animals into the state because these additional diseased animals would not create a "new risk"—the problems would merely be increased in degree.

This Court's decision in *Philadelphia v. New Jersey* did not turn on a distinction between risks new in kind versus risks greater in degree. The Court treated the New Jersey statute as economic protectionism—protecting New Jersey residents from economic competition for landfill space.

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[1] *U.S. v. Taylor*, 585 F. Supp. 393, 395 (D. Maine 1984), *rev'd*, 752 F.2d 757 (1st Cir. 1985), *rev'd sub nom. Maine v. Taylor*, 477 U.S. 131 (1986).

That case does not hold that all state restrictions on the importation of wastes are due to be summarily struck down without regard to whether the measure involves protetcion against serious threats to the health and safety of a state's citizens and its environment, or merely simple economic protectionism.

The Solicitor General argues that under *Philadelphia v. New Jersey*, any state which permits the disposal within the state of its own waste is condemned to accepting the waste of all other states. See Brief of U.S. at 13. Under such a rule, what state without a hazardous waste disposal facility at this time would be so foolish as to permit the first such facility within its borders? The construction of the Commerce Clause advanced by the Solicitor General would discourage states without facilities from developing such facilities and disposal technologies. This construction perpetuates the existing situation where the few states which have been responsible enough to permit facilities within the state to dispose of their own waste are faced with the overwhelming burden of serving as the nation's dumping grounds for hazardous and toxic wastes.[2] This is not what the Commerce Clause was intended to accomplish and it is not what this Court's decisions require.

The underlying problems giving rise to the first question presented, if in need of a solution at the national level, are more appropriate for resolution by a comprehensive legislative compromise by Congress than by piecemeal adjudication by the courts.

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[2] Such a perpetuation of the existing imbalance would clearly benefit Petitioner by protecting its position in the market. It is not clear, however, why the Solicitor General or the Environmental Protection Agency would wish to perpetuate such a situation.

II. THE BASE FEE

Although the solicitor General's entire discussion of the Additional Fee focuses on analyzing that fee as a *regulatory* measure, the Solicitor General asserts that the courts below failed to properly analyze the Base Fee as a tax, and erred in subjecting the Base Fee to analysis as a regulatory measure. The analysis of the courts below shows that the Base Fee satisfies the test for a tax as well as the test for a regulatory measure. In applying the test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), the courts below subjected the Base Fee to an *additional* level of review.

The Solicitor General recognizes that the Base Fee clearly satisfies three of the four parts of the *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), Commerce Clause test for state taxes. Brief of U.S. at 14-15. The only relevant question, under the test applicable to state taxes, is whether the Base Fee discriminates against interstate commerce. The courts below did not, as the Solicitor General asserts, merely find that the Base Fee does not *facially* discriminate, and then apply the *Pike* test. The courts below held that "[Petitioner] has failed to establish that the Base Fee has discriminatory *effects* on interstate commerce." Pet. App. 66a (trial court); *id.* at 19a (Supreme Court of Alabama) (emphasis added). Thus the courts below held that Petitioner failed to satisfy its burden of proof on the only factor of the *Complete Auto* test as to which there might have been any question.

If the Base Fee is analyzed simply as a tax, this ends the inquiry. This Court's cases do not suggest that the state needs some health, safety or other justification for a tax which applies equally to intrastate and interstate commercial transactions. The Solicitor General's discussion of factual risk-related comparisons to non-commercial

activity not subject to the Base Fee is relevant only in analyzing the Base Fee as a *regulatory* measure.[3]

Having concluded that the Base Fee *regulates* in a nondiscriminatory manner (Pet. App. 17a; *id.* at 64a), the courts below went further than merely finding a nondiscriminatory tax, and applied the *Pike* test to analyze the regulatory function. Contrary to the Solicitor General's assertion (Brief of U. S. at 16) the courts below did not uphold the Base Fee under *Pike* merely by finding a benefit to the state in the form of revenue. In addition to compensation to the state for the risks involved, the courts below found the Base Fee to further the State's interests in deterring hazardous waste landfilling and fulfilling the other health, safety and environmental objectives of the legislation. *See* Pet. App. 64a, 67a; *id.* at 17a, 20a.

There is no unresolved factual dispute "over the appropriate categorization of surface impoundments." Brief of U. S. at 18. The factual determination which the Solicitor General would have the courts below undertake on remand (Brief of U. S. at 18) has in fact already been made. The trial court, in its findings of fact, found that noncommercial facilities (including surface impoundment wastewater treatment) are not comparable to commercial facilities such as that operated by Petitioners and that because of the transportation risks, volumes and accumulation associated with commercial facilities, "the public health and safety risks associated with commercial hazardous waste facilities are much greater than those associated with non-commercial facilities." Pet. App. 63a-64a.

Although there may be some question as to the necessity of subjecting a tax which satisfies all parts of the *Com-*

[3] The Solicitor General erroneously refers to surface impoundment wastewater treatment as being exempted from the Base Fee. Surface impoundments are not necessarily exempted; noncommercial surface impoundments are not subject to the Base Fee, not because they are surface impoundments but because they are noncommercial.

plete Auto test to additional review under *Pike*, if the courts below concluded that the tax also functioned as a regulatory measure then such analysis was not improper. In any event, because the decisions below show that the Base Fee satisfies *both* the test applicable to state taxes and the test applicable to regulatory measures, there is no need for remand and no need for further review by this Court.

III. THE CAP PROVISION

The Solicitor General, while agreeing that the Commerce Clause does not prevent a state from controlling the total volumes of waste disposal within the state, asserts that the provision authorizing the Governor to allow the annual limit to be exceeded in the event of a public health or environmental emergency in the state raises a "substantial issue under the Commerce Clause of underinclusion." Brief of U. S. at 19. The Solicitor General's argument suggests that an otherwise valid enactment may violate the Commerce Clause simply because the legislature wisely provided some flexibility in the event of a situation where the state's interest in protecting public health and the environment would be better served by allowing the cap to be exceeded than by inflexible enforcement. There is neither a legal basis nor any logical reason to support this contention that an otherwise valid measure may violate the Commerce Clause by allowing some flexibility in the event of an emergency within the state, or that the state must be required to similarly respond to any need which may arise in all other states. These arguments were made by Petitioner in the courts below and properly rejected. There is no need for further review by this Court and certainly no need for remand on this issue.

CONCLUSION

The decision below is based upon and in accord with this Court's decisions. There is no need for further review of any of the questions presented. However, should the Court decide to grant the Petition as to the first question presented on a record which unquestionably establishes that this case involves health and environmental protection, not simple economic protectionism,[4] the issues involved would certainly deserve this Court's full consideration of the merits.

Respectfully submitted,

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[4] We believe that the majority opinion in *Philadelphia v. New Jersey* applies the correct rule of decision where the court rejects purported health, safety or environmental concerns and finds a state measure to involve simple economic protectionism, and that the dissent expresses the correct rule of law where the court accepts that the state is in fact acting in response to legitimate concerns.